UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MASTERCARD INTERNATIONAL INCORPORATED, Plaintiff, v. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION, Defendant.	06 Civ. 3036 (LAP) OPINION AND ORDER

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LORETTA A. PRESKA, U.S.D.J.

FIFA's latest actions demonstrate that it still does not govern itself by its slogan, "fair play." It has vigorously litigated MasterCard's request for injunctive relief in this Court and has lost, fair and square. Instead of observing the rules of the game and proceeding solely to appeal the judgment entered in this Court, it has, at the same time, sought a do-over with a different referee -- an arbitral tribunal in Switzerland. Even after judgment has been entered and with the appeal proceeding, FIFA continues to request that the arbitral

referee undo each ruling of this Court –- a course of action our courts have recognized as the antithesis of fair play. MasterCard now seeks an anti-suit injunction to prevent a do-over with this different referee, and, for the reasons set forth below, it is granted.

BACKGROUND

Plaintiff MasterCard International Incorporated ("MasterCard") brings this motion seeking an order permanently enjoining Defendant Fédération Internationale de Football Association ("FIFA") from pursuing its Complaint, and directing it to withdraw its Notice of Arbitration, in the arbitration now pending before the Zurich Chamber of Commerce ("Arbitration Tribunal"), SCA No. 600070-2006. FIFA opposes this motion for an anti-suit injunction and seeks to continue to pursue action before the Arbitration Tribunal in Switzerland.

Action in the Southern District of New York

The original action was commenced on April 20, 2006, when MasterCard filed a Summons and Complaint alleging that FIFA materially breached MasterCard's first right to acquire post-2006 sponsorship rights contained in Section 9.2 of the Official FIFA Partner Agreement between FIFA and MasterCard made as of November 26, 2002 (the "2002-06

Agreement"), which Agreement granted MasterCard sponsorship rights with respect to the FIFA World Cup and other FIFA competitions during the 2003 to 2006 time period. (Declaration of Martin S. Hyman, Esq., executed January 25, 2007, (the "Hyman Decl."), Ex. 1, MasterCard Complaint, filed April 20, 2006, ("MasterCard Complaint")). In its Complaint, MasterCard requested both preliminary and permanent injunctive relief: (i) enjoining FIFA from performing under a purported sponsorship agreement with VISA or any other "financial services" partner other than MasterCard during the period January 1, 2007 to December 21, 2014; and (ii) directing FIFA to specifically perform its obligation, under Section 9.2, to grant to MasterCard the package of advertising and sponsorship rights reflected in a 96-page written sponsorship [agreement] offer for the 2007-2014 time period that was delivered to and accepted by, MasterCard, in March 2006. (MasterCard Complaint).

On June 15, 2006, MasterCard filed a motion for preliminary injunction seeking the preliminary relief described above. (Dkt. no. 6). FIFA moved to dismiss MasterCard's complaint on jurisdictional grounds. (Dkt. no. 20). It also moved to compel arbitration on the basis that the matters in the suit before this Court fit within the broad language of the parties' arbitration provision,

Section 22 of the 2002-06 Agreement, and that the ultimate merits of the parties' dispute should be resolved exclusively through arbitration in Switzerland. (Dkt. no. 20). FIFA's motion to dismiss for lack of personal jurisdiction was denied from the bench on July 20, 2006, and a written Opinion and Order was issued dated August 10, 2006. (Dkt. nos. 46, 48). FIFA's motion to compel arbitration was denied by a decision read into the record on July 27, 2006. (Dkt. no. 46)(Hyman Decl., Ex. 2, Transcript of the Decision, dated July 27, 2006, (the "Decision")). In the Decision, the Court determined, as a threshold matter, that "it is the Court [and not the arbitrators] that must decide whether this dispute is subject to arbitration." (Id. at p.4). The Court examined the Swiss law presented by both sides as well as the arbitration provision in the 2002-06 Agreement (that provided for a non-breaching party to seek "any and all equitable relief including an injunction" in a court of competent jurisdiction (2002-06 Agreement, ¶ 22)) and determined that the Court could decide the ultimate merits of the non-breaching party's claim for equitable relief, including permanent (as opposed to temporary) equitable relief, (id. at pp. 4-10).

On September 25, 2006, the trial on the merits was consolidated with the preliminary injunction hearing. (Dkt. no. 54). The preliminary injunction hearing and trial on the merits were held on November 28 through December 1, 2006, during which the Court received evidence and heard testimony from live witnesses.

On December 6, 2006, this Court issued its Findings of Fact and Conclusions of Law, amended the following day on December 7, 2006. (Hyman Decl., Ex. 3, Amended Findings of Fact and Conclusions of Law, dated December 7, 2006, ("Amended Findings and Conclusions")). The Court concluded that FIFA had materially breached Section 9.2 of the 2002-06 Agreement by "not granting the package of post-2006 rights offered to, and accepted by, MasterCard at FIFA's asking price and instead purporting to grant them to VISA." (Amended Findings and Conclusions, at ¶ 100 of Conclusions of Law).[1] The Court also determined that "FIFA's conduct in performing its obligations under Section 9.2 and in its negotiations relating to the sponsorship rights covered by that section breached the obligation of good faith imposed by Swiss law, and thus FIFA breached the [2002-06]

[1] In finding the 2002-06 Agreement still in effect, and, thus, Section 9.2 operative, the Court also found that "FIFA's September 20, 2006 letter purporting to terminate the [2002-06] Agreement is null and void." (Amended Findings and Conclusions at ¶ 106 of Conclusions of Law).

Agreement." (Id. at ¶ 101 of Conclusions of Law). In addition, the Court found that "independently of the foregoing breaches, FIFA has breached section 9.2 of the 2002-06 Agreement by granting to VISA rights that are not 'on comparable terms' to those offered to MasterCard". (Id. at ¶ 102 of Conclusions of Law). The Court determined that an injunction was appropriate because "in the absence of an injunction, MasterCard would suffer . . . irreparable harm." (Id., at ¶¶ 13, 21 of Conclusions of Law) ("MasterCard's loss of the next World Cup Sponsorship would be, in its now-famous words, 'Priceless.'"). Finally, in accordance with Section 22 of the 2002-06 Agreement, the Court found that MasterCard was entitled to its "costs and expenses in connection with its enforcement of its rights including all reasonable legal fees, costs and disbursements." (Id. at ¶ 121(c) of Conclusions of Law).

Accordingly, judgment was entered on December 8, 2006 (Dkt. no. 79)(the "Judgment"), stating that it is hereby:

> ORDERED that FIFA is permanently enjoined from implementing or otherwise proceeding with its purported 2007-14 "FIFA World Cup" sponsorship agreement with VISA or otherwise granting to VISA, or any entity other than MasterCard, any package of advertising and sponsorship rights, with respect to

payments solutions or financial services products or services, in connection with FIFA competitions during the period 2007 to 2014; and it is further

ORDERED that FIFA shall specifically perform its obligations to MasterCard under section 9.2 of the [2002-06 Agreement], by granting to MasterCard the package of advertising and sponsorship rights, which previously was offered to and accepted by MasterCard, with respect to payment solutions products or services, in connection with FIFA competitions during the period 2007-2014, on the terms and conditions set out in the 2007-14 sponsorship agreement delivered by FIFA to MasterCard on March 3, 2006 to execute and that MasterCard did execute; and it is further

ORDERED that, in accordance with section 22 of the 2002-06 Agreement, FIFA shall pay to MasterCard all of MasterCard's "costs and expenses in connection with its enforcement of its rights, including all reasonable legal fees, costs, and disbursements." The amount of those costs and expenses shall be determined following the conclusion of any appellate proceedings or after FIFA's time to appeal has expired.

(Judgment).

On December 12, 2006, FIFA timely filed a notice of appeal from the Judgment challenging, inter alia, the Court's decision to determine arbitrability; the denial of FIFA's motion to compel arbitration; and issuance of a permanent injunction on the merits. (Declaration of T. Barry Kingham, Esq., executed on February 9, 2007, ("Kingham Decl."), Ex. B, FIFA's Opening Appellate Brief). On December 21, 2006, the parties entered into a post-judgment Stipulation and Order which, inter alia, stayed pending appeal that portion of the Judgment that compelled FIFA to grant to MasterCard the post-2006 sponsorship rights on the terms and conditions set out in an agreement presented to MasterCard on March 3, 2006. (Hyman Decl., Ex. 6, Stipulation and Order, dated December 21, 2006, ("Stipulation and Order")). FIFA's appeal has been granted expedited treatment (one of the conditions of the stay) and tentatively has been set down for argument during the week of March 19, 2007. On January 26, 2007, MasterCard filed the instant motion to enjoin FIFA from proceeding with the arbitration in Switzerland.

Arbitration Before the Zurich Chamber of Commerce Arbitral Tribunal

While the Court was considering FIFA's motions, FIFA formally commenced arbitration by filing a Notice of

Arbitration with the Zurich Chamber of Commerce's Arbitral Tribunal on June 21, 2006. In its Notice, FIFA requested that its dispute with MasterCard be referred to arbitration in Switzerland and that it be awarded the following relief: (i) "It shall be declared that FIFA did not violate clause 9.2 of the contract with MasterCard"; (ii) "it shall be declared that FIFA is not obliged to conclude a new contract with MasterCard for any period after 2006"; and (iii) MasterCard "shall bear all costs of the arbitration proceedings." (Hyman Decl., Ex. 7, Notice of Arbitration, dated June 21, 2006, "Notice of Arbitration"). On August 3, 2006, MasterCard submitted an Answer to the Notice of Arbitration and Notice of Counterclaim: (i) denying the Arbitral Tribunal's jurisdiction over FIFA's purported claim; (ii) denying the merit of FIFA's claim; and (iii) asserting as a counterclaim essentially the same claim for equitable relief (and, in the alternative, for damages) that it asserted in its action before this Court. (Hyman Decl., Ex. 8, Answer to Notice of Arbitration and Notice of Counterclaim, dated August 3, 2006, ("Answer to Notice of Arbitration and Notice of Counterclaim")).

On November 8, 2006, the Arbitral Tribunal conducted a Preliminary Hearing, during which it heard argument as to whether it had jurisdiction over the dispute or whether it

would stay its proceedings pending the outcome and any subsequent appeal of the litigation before this Court. On November 23, 2006, before issuing its decision on MasterCard's jurisdictional challenge, an Amended Provisional Time-table was issued under which FIFA was provided until January 12, 2007 to submit a "Full Complaint"; MasterCard was given until February 26, 2007 to submit an "Answer to [the] Main Claim"; the first round of evidentiary submissions were set to commence on March 26, 2007; and the Hearing was scheduled to begin on May 1, 2007. (Hyman Decl., Ex. 9, Amended Provisional Time-table, dated November 23, 2006, ("Amend. Provisional Time-table")).

On November 27, 2006, the Arbitral Tribunal issued a Preliminary Award denying MasterCard's request to dismiss the arbitration for lack of jurisdiction or, in the alternative, to stay the arbitration pending resolution of the action. (Hyman Decl., Ex. 10, Preliminary Award, dated November 27, 2006, ("Preliminary Award")). The Arbitral Tribunal concluded that only it, and not this Court, had jurisdiction to award permanent relief to the parties. (Preliminary Award at ¶ 208). The Arbitral Tribunal accepted and adopted the position of FIFA, which was rejected by the Court's Amended Findings of Fact and

Conclusions of Law, that "any and all equitable relief" referred to in Section 22 of the 2002-06 Agreement encompasses only "provisional" and "conservatory" relief. (Id. at ¶¶ 172, 191-92, 208). Thus, the Arbitral Tribunal noted that "it makes little sense to have both the Southern District and the Arbitral Tribunal have final jurisdiction. But the question simply is, which of the two rightly has final jurisdiction." (Id. at ¶ 189)(emphasis in original). The Arbitral Tribunal went on to conclude that "there is no jurisdiction of these other fora for final relief, no matter whether legal or equitable in nature under Anglo-American concepts." (Id. at ¶ 208). It further noted that any "court decision resulting from the proceedings in New York would, based on the facts submitted so far, most likely not be recognizable in Switzerland." (Id. at ¶ 118).

In accordance with the Amended Provisional Time-table, FIFA submitted its Full Complaint to the Arbitration Tribunal on January 12, 2007. The 111-page Full Complaint seeks a declaration from the Arbitral Tribunal that:

> (i) "on September 20, 2006, Claimant [FIFA] rightfully terminated the 2002-06 Agreement" and thus, as a consequence thereof, "Respondent [MasterCard] can no longer rely on its first right to acquire pursuant to Section 9.2 of the 2002-06 Agreement";

(ii) in the alternative, "FIFA did not violate section 9.2 of the [2002-06] Agreement . . . [or] the principle of good faith vis-à-vis MasterCard during the term of the [2002-06] Agreement";

(iii) "FIFA is not obliged to conclude a new contract with MasterCard for any period after 2006"; and

(iv) "[t]he Respondent [MasterCard] shall bear . . . the costs for legal representation and assistance of Claimant [FIFA]."

Hyman Decl., Ex. 11, Arbitration Full Complaint, dated January 12, 2007, ("Arbitration Complaint") at ¶ 1).

FIFA claims that it may be granted such relief because the Arbitral Tribunal already has held "that it is not bound to recognize the views of the District Court" and that the Court's Amended Findings of Fact and Conclusions of Law contain "numerous . . . deficiencies" and is the product of "emotionally charged bias." (Arbitration Complaint at ¶¶ 14, 29). Therefore, FIFA confirms that "the object of this arbitration" is, in essence, to undo the Judgment, specifically to "determine that FIFA . . . was entitled to terminate the [2002-06 Agreement], and, as a consequence thereof . . . violated neither section 9.2 of

the [2002-06] Agreement nor its duty to negotiate according to the principle of good faith." (Id. at ¶ 30).

DISCUSSION

I. Jurisdiction

While for some months parallel proceedings have progressed in two separate fora on the issue of FIFA's alleged breach of the 2002-06 Agreement, this Court conducted a preliminary injunction hearing and trial on the merits and entered a final judgment, the first (and only) final judgment to be entered in either forum. That judgment was then appealed by FIFA to the Court of Appeals. Although the general rule is that once a notice of appeal has been filed, jurisdiction is conferred on the Court of Appeals and the district court is divested of its control over those aspects of the case involved in the appeal, the Court of Appeals has recognized exceptions to that general rule. E.g., Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556 (2d Cir. 1991)(citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)(per curiam) and Int'l Ass'n of Machinists & Aerospace Workers v. Eastern Air Lines, 847 F.2d 1014 (2d Cir. 1988))(internal quotations omitted).

In Kidder Peabody, the plaintiff filed an action for declaratory relief in the Southern District of New York mere hours after the defendant Maxus had filed suit for breach of contract and negligence against Kidder, Peabody in Texas state court. After the two actions proceeded in parallel for almost two years, the district court granted declaratory judgment in favor of Kidder Peabody. Id. Maxus then appealed from the judgment and moved for summary judgment in its favor in the Texas state court action. Id. at 565. While the appeal was pending, Kidder Peabody moved in the district court for an anti-suit injunction, which the district court granted, enjoining Maxus from pursuing in Texas state court any claim, no matter how denominated, arising from the transaction at issue in the New York action. Id. On appeal, Maxus argued that, because of its appeal, the district court lacked the jurisdiction to grant the anti-suit injunction. Id. The Court of Appeals rejected that argument, noting that under Federal Rule of Civil Procedure 62(c), a district court may grant injunctive relief after a proper notice of appeal has been filed, but only when it is necessary to preserve the status quo pending the appeal. Id. The Court of Appeals went on to hold that the district court "had the jurisdiction to issue an injunction to preserve the status quo" and had

properly enjoined Maxus from relitigating the issues decided in the district court. Id.[2]

By virtue of the Amended Findings and Conclusions, the Judgment and the Stipulation and Order of December 18, 2006 (staying that portion of the injunction requiring FIFA's specific performance of Section 9.2 by granting post-2006 sponsorship rights to MasterCard), the status quo in this action is that FIFA is in breach of the 2002-06 Agreement and is prohibited from proceeding with its purported agreement with VISA for post-2006 sponsorship rights. FIFA seeks to change the status quo by arbitrating in Switzerland in an effort to undo the very issues that were tried and decided by this Court. Just as in Kidder Peabody, FIFA seeks to re-litigate the precise issues upon

[2] In addition to preserving the status quo, the Court of Appeals has recognized other instances where a district court may exercise limited jurisdiction notwithstanding a pending appeal, such as taking measures that will aid the appeal, acting on measures that are collateral to the issues on appeal, or as specifically provided by the Federal Rules of Civil Procedure. See, e.g., Tancredi v. Metropolitan Life Ins. Co., 378 F.3d 220, 225 (2d Cir. 2004)(stating that district court's "residual jurisdiction over collateral matters" permits it to award attorneys' fees while appeal is pending); Leonhard v. United States, 633 F.2d 599, 609-10 (2d Cir. 1980)("[o]nce a proper appeal is taken, the district court may generally take action only in aid of the appeal or to correct clerical errors as allowed by the Federal Rules."). Thus, it is not the law, as FIFA seems to suggest, that every proper appeal completely divests a district court of its control over aspects of the case involved in the appeal.

which judgment has been entered. If FIFA were to go forward in Switzerland, it is conceivable that it could obtain, and enforce, an inconsistent arbitration award even before the Court of Appeals decides FIFA's appeal. Such a result would change the status quo, which is precisely what an anti-suit injunction may be employed to prevent. Accordingly, the Court has jurisdiction to grant an anti-suit injunction, regardless of the pendency of FIFA's appeal.

II. Standard for Anti-Suit Injunction After Judgment Is Entered in One of Two Parallel Proceedings

As the Court of Appeals has recognized, "[i]t is beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum," but "principles of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'" Paramedics Electromedicina Comercial, Ltda. v. GE Medical Systems Info. Tech., Inc., 369 F.3d 645, 652 (2d Cir. 2004)(quoting China Trade and Devel. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987)). The Court of Appeals recently reiterated that "due regard for principles of international comity and

reciprocity require a delicate touch" when considering anti-suit injunctions. Ibeto Petrochemical Indus. Ltd. v. M/T Beffen, 475 F.3d 56, 65 (2d Cir. 2007).

However, "where a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may . . . be necessary to protect the enjoining court's jurisdiction." China Trade, 837 F.2d at 36. While "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other," id. (quoting Laker Airways, Ltd. v. Sebena, Belgian World Airlines, 731 F.2d 909, 926 (D.C. Cir. 1984))(internal quotations omitted), "there is less justification for permitting a second action . . . after a prior court has reached a judgment on the same issues," Paramedics Electromedicina, 369 F.3d at 654 (quoting Laker Airways, Ltd., 731 F.2d at 928 n.53)(internal quotations omitted). In such a situation, "[a]n anti-suit injunction may be needed to protect the court's jurisdiction once a judgment has been rendered," because while "[t]he doctrine of res judicata . . . may obviate injunctive relief against re-litigation in a second forum[,] . . . a foreign court might not give res judicata effect to a United States judgment."

Paramedics Electromedicina, 369 F.3d at 654. Thus, where, as here, "one court has already reached a judgment -- on the same issues, involving the same parties -– considerations of comity have diminished force." Id. at 655.

The Court of Appeals continues to employ the test announced in China Trade to evaluate when an anti-suit injunction against parallel litigation may be imposed. E.g., Ibeto, 475 F.3d at 64. Pursuant to the China Trade test, the threshold requirements for an anti-suit injunction are: (1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined. Id. 837 F.2d at 35. Here, those threshold requirements are met.

First, clearly MasterCard and FIFA are the parties in both matters. Second, as set out in detail above, FIFA seeks in the arbitration to undo the findings embodied in the Amended Findings and Conclusions and the Judgment, viz., that FIFA's purported termination of the 2002-06 Agreement was null and void, that FIFA violated Section 9.2 of the 2002-2006 Agreement, that FIFA is prohibited from proceeding in any post-2006 sponsorship in the financial services category with VISA but shall proceed with MasterCard pursuant to the 2007-2014 MasterCard Agreement

between FIFA and MasterCard, which was sent by FIFA on March 3, 2006, signed by MasterCard and returned to FIFA by March 24, 2006, and that FIFA shall pay MasterCard's costs and expenses. Compare Amended Findings and Conclusions at ¶¶ 100, 101, 106, 116, 121 of Conclusions of Law and Judgment with Arbitration Complaint at ¶ 1. Thus, the Judgment entered by this Court after a four-day preliminary injunction hearing and trial on the merits is dispositive of the action that FIFA is seeking to pursue before the Arbitral Tribunal in Switzerland. Indeed, as noted above, FIFA itself stated in its Full Complaint to the Arbitral Tribunal that "the object of this arbitration remains the same" –- to have the Arbitral Tribunal reach conclusions opposite to those embodied in the Judgment. (Arbitration Complaint at ¶ 30).

FIFA argues that because MasterCard has filed a counterclaim in the arbitration seeking, inter alia, money damages, the findings here are not dispositive of all issues in the arbitration proceeding. While this fact might affect the scope of an anti-suit injunction, that is, exactly what FIFA is prohibited from arbitrating, it does not change the fact that the determinations in this Court are dispositive of FIFA's claims in the arbitration -- the

only proceeding sought to be enjoined. Thus, the second threshold requirement is met.

FIFA argues that if an anti-suit injunction is issued, it should be temporary and should not require FIFA to withdraw its notice of arbitration. Although FIFA does not support its assertion that withdrawal of its notice to arbitrate could have a res judicata effect and although the potential outcomes in the Court of Appeals suggest no prejudice to FIFA,[3] FIFA noted at oral argument that, at all events, it sought a declaration of its rights vis-à-vis MasterCard. If the Court of Appeals affirms in all respects, FIFA will have received such a declaration and thus will have no need to proceed elsewhere. If the Court reverses, in whole or in part, it is possible that the Arbitral Tribunal might be found to be the appropriate forum for such a declaration.

Also, the Ibeto court indicated the desirability of temporary relief. 475 F.3d at 65. There, the District Court granted defendants' motions to compel arbitration and

[3] If FIFA loses the appeal, then any anti-suit injunction granted now will become more, not less, provident. If FIFA wins the appeal, and MasterCard is compelled to arbitrate, then any anti-suit injunction the Court grants now will become immaterial. Under those circumstances, if MasterCard desired relief, it would have to bring an arbitration claim, and FIFA would not have to re-file the arbitration notice that it was ordered to withdraw.

enjoined the parties from pursuing a lawsuit concerning the same subject matter in Nigeria. On appeal, the Court of Appeals noted that "there is no need for [a] permanent injunction . . . . The parties need to be enjoined from proceeding in the courts of Nigeria only until the conclusion of the London arbitration and the consequent resolution of the still pending case in the District Court." Id. at 65. Accordingly, temporary relief here might well be more appropriate.[4]

Once these threshold requirements have been met, there are additional factors cited by the China Trade Court that should be considered to determine if an anti-suit injunction is appropriate. However, as FIFA has conceded, "the standard for enjoining foreign litigation after the domestic court reaches judgment is lower."[5] Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118, 131

[4] At oral argument, the parties agreed that if an anti-suit injunction issued prohibiting FIFA from re-litigating the issues determined in this action, it would be inefficient for MasterCard to prosecute its counterclaim while FIFA's appeal was still pending in the Court of Appeals. Accordingly, MasterCard agreed, under those circumstances, to stay the prosecution of its counterclaim pending resolution of the appeal.

[5] Contrary to the suggestion made by FIFA that perhaps the lower standard should not be applied because the judgment of this Court is on appeal and thus not final, it is well-settled that a judgment is final and entitled to res judicata effect even on appeal. See, e.g. Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 188 (1941).

(S.D.N.Y. 1997). (FIFA's Memorandum of Law in Opposition to MasterCard's Motion for Anti-Suit Injunction, dated Feb. 9, 2007, ("FIFA Opp. Memo"), at p. 16) ("Where, as here, this Court has issued a judgment, MasterCard must establish 'harassment, bad faith or other equitable circumstance to . . . support enjoining the foreign litigation.'" citing Farrell Lines). The standard is more lenient at the post-judgment stage because "[w]hen the injunction is requested after a previous judgment on the merits, there is little interference with the rule favoring parallel proceedings in matters subject to concurrent jurisdiction. Thus, a court may freely protect the integrity of its judgments by preventing their evasion through vexatious or oppressive relitigation." Farrell Lines, 32 F. Supp. 2d at 131 (quoting Laker Airways, 731 F.2d at 928)(footnotes omitted).

Although FIFA asserts that "it commenced the arbitration in . . . good faith" "many months ago, only a short time after MasterCard filed its complaint," that there was "no forum shopping here" and that it is not "certain that the arbitration will result in significant delay, inconvenience, expense or an inconsistent decision" (FIFA Opp. Memo at pp. 16-17), those assertions are belied by the present state of the record. Even if FIFA's claims

of "good faith" and "no forum shopping" intentions when it originally brought the arbitration can be taken at face value -- which is questionable given that FIFA did not bring the arbitration until two months after this lawsuit was filed and only in response to MasterCard's preliminary injunction motion -- its continued pursuit of the arbitration now, when all of the issues have been decided and judgment entered, cannot possibly be reconciled with good faith or the absence of forum shopping. Its post-judgment pursuit in the arbitral forum of a result opposite to that obtained in this Court is a paradigm of bad faith forum shopping.

FIFA's assertion that the arbitration might not result in any inconvenience, expense or risk of an inconsistent decision is so obviously untrue as to be astounding. It is beyond peradventure that there would be increased expense and inconvenience to the parties if they are required to re-litigate the same issues on which they already have expended hundreds -- indeed, more likely, thousands -- of hours, including extensive motion practice, depositions and a four-day trial. Also, while the potential outcome of the Arbitral Tribunal cannot be determined at this point, the Arbitral Tribunal stated in its Preliminary Award on November 27, 2006 that any "court decision resulting from

the proceedings in New York would, based on the facts submitted so far, most likely not be recognizable in Switzerland," (Preliminary Award at ¶ 118), and thus there is danger of an inconsistent award.

Therefore, while the Court is cognizant of the need to employ "a delicate touch" in considering an anti-suit injunction out of respect for principles of international comity, Ibeto, 475 F.3d at 65, those "considerations of comity have diminished force" at this post-judgment stage, Paramedics Electromedicina, 369 F.3d at 654. Accordingly, based on the more lenient standard applicable after a domestic judgment has been entered, an anti-suit injunction is appropriate in this case in order "to protect the integrity of [this Court's] judgment[] by preventing [its] evasion through vexations or oppressive relitigation," Farrell Lines, 32 F. Supp. 2d at 131 (quoting Laker Airways, 731 F.2d at 928), which would expose the parties to possible inconsistent judgments.

B. China Trade Standard For Anti-Suit Injunctions

Even if FIFA did not act in bad faith or if the lower post-judgment standard is not applicable, an anti-suit injunction would still be appropriate under the additional factors discussed in China Trade. As discussed above,

there are two threshold requirements from China Trade that must be met: (1) the parties must be the same in both matters; and (2) the resolution of the case before the enjoining court must be dispositive of the action to be enjoined. Once those requirements are met, the China Trade Court listed five additional factors that courts should consider when determining whether to grant an anti-suit injunction: (1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issues in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment. 837 F.3d at 35.

In China Trade, the Court of Appeals found that the factors having "greater significance" in that case were threats to the enjoining forum's jurisdiction and to its strong public policies. Id. at 36. However, the Court of Appeals has more recently noted that "some courts and commentators have erroneously interpreted China Trade to say that we consider only these two factors. Ibeto, 475 F.3d at 64.(emphasis in original). While it is appropriate to consider all five factors under the China Trade test,

there is no explicit instruction from the Court of Appeals that all the factors must be given the same consideration and weight, and China Trade seems to suggest that weight may vary according to the facts. 837 F.3d at 35 (referring to "the factors having 'greater significance'") (citation omitted). Under the circumstances presented here, the China Trade factors weigh in favor of granting an anti-suit injunction.

While the Court of Appeals in China Trade listed the third factor as a threat to the issuing court's in rem or quasi in rem jurisdiction and noted that that was a long-standing exception to the usual rule tolerating concurrent proceedings, the Court went on to explain that "[e]ven in in personam proceedings, if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may also be necessary to protect the enjoining court's jurisdiction." 837 F.3d at 36. That is precisely what the Arbitral Tribunal is attempting to do here. As noted above, the Tribunal has already determined that "there is no jurisdiction of these other fora for final relief" on the merits of this dispute, (Preliminary Award at ¶ 208), and that this Court's judgment would "most likely not be recognizable in Switzerland," (id. at ¶ 30) (emphasis in

original). Thus, the Arbitral Tribunal is not merely proceeding in parallel but is "carving out" exclusive jurisdiction over the action. China Trade, 837 F.2d at 36. When the action of a litigant in another forum "threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings." Laker Airways, 731 F.2d at 927. This is the most weighty factor under the circumstances presented here, and it strongly supports issuance of an anti-suit injunction.

As to other China Trade factors, as noted above, FIFA's admitted attempt in the arbitration to re-litigate the same issues that were decided by this Court upon which judgment which has been entered, evidenced by the relief it seeks in its Arbitration Complaint, would be vexatious and would result in delay, inconvenience, expense and would present the possibility of inconsistent judgments. Although a less weighty policy consideration than the policy favoring arbitration noted in Ibeto, 475 F.3d at 65, and Paramedics Electromedicina, 369 F.3d at 654, the general policy of protecting final judgments noted in the anti-suit injunction cases and, most recently, in Karaha Bodas Co., LLC v. Pertamina, No. 21-MC-00098(TPG), 2006 WL

2615063, at *13 (S.D.N.Y. Dec. 8, 2006), weighs in favor of issuing the anti-suit injunction. Thus, even under the higher China Trade standard, the factors considered weigh in favor of granting an anti-suit injunction.

C. Laches

FIFA argues that the equitable relief MasterCard seeks should be denied because of MasterCard's inequitable conduct. The supposed inequitable conduct is MasterCard's waiting until now to seek an anti-suit injunction; the supposed prejudice is the time and expense devoted by FIFA to pursuing the arbitration.

Throughout its opposition papers, but particularly in making its laches argument, FIFA fails to acknowledge the quantum difference between parallel proceedings pre- and post-judgment. As the Court of Appeals recognized expressly in China Trade, "parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached . . . ." Id. at 36 (emphasis added) (quoting Laker Airways, 731 F.2d at 926-27); see Farrell Lines, 32 F. Supp. 2d at 131 ("the standard for enjoining foreign litigation after the domestic court reaches judgment is lower"). Under this rule, a request by MasterCard for an anti-suit injunction in advance of judgment would most likely have been denied

as premature but is appropriate at this post-judgment stage. In light of this unambiguous law, FIFA's argument that MasterCard's delay in requesting an anti-suit injunction until after judgment had been entered is disingenuous at best.

CONCLUSION

For the reasons set out above, MasterCard's motion for a temporary anti-suit injunction is granted.

SO ORDERED:

Dated: New York, New York
February 28, 2007

Loretta A. Preska

LORETTA A. PRESKA, U.S.D.J.